RECENT CASES.

CARRIERS—LIABILITY AS AFFECTED BY CONSPICUOUSLY POSTED REGULATIONS.—Can a carrier relieve itself of its liability by a regulation which, though reasonable, has not been brought to the notice of the passenger? This question was decided in Renaud v. N. Y., N. H. & H. R. R. Co., 97 N. E. Rep. 98 (Mass. 1912). Plaintiff's intestate, a passenger on a moving train of the defendant company, left his seat, went out to the lower step of the car, and was thrown off and killed through the suction created by a passing train on the next track. The action was brought under a Massachusetts Statute (St. 1906, C. 463, pt. 1, Sec. 63), giving a right of action to recover damages for the death of a passenger caused by the negligence of a railway company. On the panel inside the door in the car of the defendant company was conspicuously painted a regulation, to the effect that "passengers are forbidden to ride in any baggage car or on the platform or steps of any car."

The court states the general proposition that the "onerous obligation of care for passengers imposed by law on the carriers bears with it the correlative right to require observance of reasonable regulations for the safe transportation of passengers as a condition of continuance of the relation, and failure to comply with these will deprive the passengers of the protection to which they are entitled." And the question raised was, whether the deceased had forfeited his rights as a passenger by his infringement of the regulation, regardless of whether or not he knew of it.

In deciding the case the court first stated that it is the law in some jurisdictions that the regulations need not in all instances be brought home to the knowledge of the passenger in order to bind him. The cases cited for this, however, really go no further than holding that knowledge can be presumed. Thus in Whitesell v. Crane, 8 W. & S. 369 (Pa. 1845), it was held that the printed conditions of a line of public coaches were sufficiently made known to the passengers by being posted up at the place where they booked their names. And Macon & Western R. R. Co. v. Johnson, 38 Ga. 409 (1868), decided that if a notice be proved to have been posted in large metal letters upon the doors of the passenger cars a passenger will be presumed to know it.

Continuing, the court said that "sounder reason supports the view that a regulation, in order to be binding upon the passenger, must be known to him. There need not be positive evidence that it was expressly called to his attention. Knowledge may be inferred from widely posted notices, from the experience of the passenger in traveling, from the nature of the rule itself as according with the dictates of common prudence and from other significant circumstances." This is certainly representative of the weight of authority. Armstrong v. Montgomery Street Railway Co., 123 Ala. 233 (1898); Western Maryland R. R. Co. v. Herold, 74 Md. 510 (1891); O'Neill v. Lynn & Boston R. R. Co., 155 Mass. 371 (1904).

Further than this on the point of the necessity of knowledge the decision did not go. The remaining points decided were, (1) that the decedent's rights as passenger were not put an end to by his mere violation of this rule. In the words of the court, "violation of a reasonable rule of a common carrier by a passenger, not involving malicious conduct, moral turpitude, gross and willful disregard of the rights of others or a plain surrender of the duty of a passenger, does not of itself alone terminate the contract of carriage and transform the one who was a passenger into a bare licensee or trespasser. There must be a notice by the common car-

rier, or some one acting in its behalf, calling the attention of the passenger to his act, which may be due to inadvertence or momentary forgetfulness or misapprehension;" (2) that the rule was admissible as relevant to prove negligence on the part of the conductor of the train, on the ground that conduct which would constitute due care on the part of the conductor if the deceased knew of the rule would or might be very different from that required if there had been no rule and passengers were in the habit of riding upon the platform.

CARRIERS—WHAT CONSTITUTES BAGGAGE.—In Wood v. Cunard S. S. Co., 192 Fed. 293 (1911), the manuscript of a manual on Greek grammar contained in the trunk of a passenger was held to be a proper part of his baggage. The passenger was a teacher, who used the manuscript as an aid to his teaching and for lecture purposes. The court treated the manuscript as one of the "tools of trade" of the teacher.

What is included by the term "baggage" cannot be definitely stated. It depends upon the circumstances of each case. In Macrow v. The Railway Co., L. R. 6 Q. B. 612, Cockburn, C. J., said, "Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey, must be considered as personal luggage." The courts have not confined baggage to wearing apparel and similar articles, but have included tools of a journeyman carpenter. Porter v. Hildebrand, 14 Pa. 129 (1850); harness-maker's tools, Davis v. Cayuga & Susquehanna R. R., 10 How. (N. Y.) 330 (1855), and watchmaker's tools, Kansas City R. R. v. Morrison, 34 Kan. 502 (1886). Of course the tools must be reasonably appropriate to the owner's trade, both in kind and quantity. The case of Hopkins v. Westcott, 6 Blatch. (W. S. C. C.) 64 (1868), in which manuscript books, the property of a student, and necessary to the prosecution of his studies, were held to be baggage is very analogous to the principal case. The court in that case said, "With the lawyer going to a distant place to attend court, with the author proceeding to his publishers, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet an indispensable, part of his baggage. * * * They are indispensable to the object of his journey."

The manuscript of the teacher in the principal case would seem to be as indispensable a part of his baggage as the tools of a carpenter or the manuscript of a student, and therefore properly considered as baggage.

CONFLICT OF LAWS—EFFECT OF DIVORCE ON TITLE TO PROPERTY ACQUIRED BY A HUSBAND FROM HIS WIFE.—The plaintiff, a citizen of New York, married the defendant, a citizen of Switzerland, in France. Subsequently she purchased with her own money certain real estate situated in New York, and conveyed to her husband a one-half interest therein in fee simple. Later she divorced him in Switzerland. By the Swiss law the husband was bound to return to the wife all property which he had received from her. Upon these facts the plaintiff sued in the New York courts and demanded a reconveyance or a cancellation of the prior conveyance. The court held that the law of New York was the proper law to apply and that the title and interest acquired by the husband under the conveyance were not disturbed by the divorce. De Graffenried v. De Graffenried, 132 N. Y. Supp. 1107 (1912).

The case is in accord with the weight of American authority in cases dealing with the respective rights of the husband and wife in real property owned by either or both of them. The *lex rei sitae* governs. Story on Conflict of Laws, Sec. 159. The case does not conflict with those cases which hold that the rights of the parties in the personal property used to purchase the realty determines their rights in the realty, because the money

here given as consideration was admittedly the separate property of the wife. *Re* Burrows, 136 Cal. 113, 1902; Ellington v. Harris, 127 Ga. 85 (1906).

In the case of *In re* DeNichols, 69 L. J. Ch. 680 (1900), the English courts read into the marriage contract the tacit agreement that the law of the matrimonial domicile should govern all future acquisitions of real or personal property, and distributed real property held in England according to that law. The New York courts in *Re* Majot, 199 N. Y. 29 (1910), repudiated this decision on the ground that the statutes of New York requiring all contracts, dealing with land or made in consideration of marriage to be in writing were declaratory of a paramount public policy. The latter decision seems the better, although the reasons given are weak.

Compare with the principle case Fall v. Easton, 215 U. S. 1 (1909), where the United States Supreme Court held that the courts of Nebraska need not recognize a deed to land in Nebraska, executed by a commissioner under a decree of a court of another State in an action of divorce, under the full faith and credit clause of the Federal Constitution.

COUNTIES—POWER OF COUNTY COURT TO ALIENATE PROPERTY.—A railroad had given land to the county to be used for court house purposes. After a number of years, the court, finding that it had much more land than it required, proposed to sell a part to the United States government for public government purposes. The taxpayers of the county sought to restrain this sale on the ground that the original deed provided that the judicial proceedings of the county should be held upon the premises, and that such a sale would exceed the powers of the county court. *Held:* That since the deed did not provide for a reversion of title to the grantor in case the land should cease to be used for the express purpose given, the right of alienation of the county court was not restricted. Keatley v. Summers County Court, 73 S. E. Rep. 706 (W. Va. 1912).

It seems that counties, through their proper authorities, may in general alienate or dispose of property, like any other corporation, unless restrained by charter or statute. Shannon v. O'Boyle, 51 Ind. 565 (1875); R. R. Co. v. Miami County, 12 Kansas, 482 (1874). It is immaterial whether the property was acquired by gift or purchase. Warren County v. Patterson, 56 Ill. 111 (1870). Where the county authorities may exercise a discretion in the selection of locations for public buildings, the sale of land not desired by them cannot be questioned. Board of Supervisors v. Gorrell, 20 Grat. 484 (Va. 1871).

On the other hand, some jurisdictions deny the authority of the county to dispose of property without the aid of special legislation. Jefferson County v. Grafton, 74 Miss. 435 (1897). Even when there is a declared intention of obtaining other land for public purposes, the sale or exchange of land owned by the county will be void if without legislative authority. Dupuy v. Iberville, 41 So. 91 (La. 1906). Some courts make the limitation that property dedicated to, or held by, a county in trust for public use cannot be alienated for the county's own benefit. Lyman v. Gedney, 114 Ill. 388 (1885); Merriwether v. Garrett, 102 U. S. 472 (at 513); Roper v. McWhorter, 77 Va. 214 (1883).

CRIMES—COERCION OF A WIFE BY HER HUSBAND.—The defendant had asserted to city officials that she would conduct a disorderly house in spite of their prohibition. It appeared that her husband lived in the house with her, but no actual coercion by him was shown. It was held that the jury might negative the presumption of coercion and fasten guilt on the wife. State v. Hoelcher, 143 S. W. Rep. 850 (Mo. 1912).

The presumption of coercion by the husband, where crimes are done in his presence, is rebuttable. St. v. Ma Foo, 110 Mo. 7 (1892). Easily so, in the case of keeping a bawdy house. 1 Rus. Cr. (1896) 151. It has indeed

been held that in this case there is no presumption of coercion. Com. v. Cheney, 114 Mass. 281 (1873); McClain Cr. L. S. 148.

In some jurisdictions a wife is jointly liable with her husband for keeping a bawdy house, and a conviction of the husband is no bar to the prosecution of the wife. Com. v. Heffron, 102 Mass. 148 (1869). But merely failing to object does not make her liable. She must give an active permission. Bell v. State, 92 Ga. 49 (1893). A husband, however, to relieve himself, must do all in his power to stop such use of the premises. Com. v. Wood, 97 Mass. 225 (1867).

In an analogous line of cases a wife was held liable for selling intoxicating liquors, in the absence of her husband, and it was no defense that the husband controlled the use of the premises. Com. v. Tryon, 99 Mass. 442 (1868). And, similarly, where the husband attempted to stop the sale, he was not liable. 29 Ky. L. R. 105 (1906); but he was liable where he did not use reasonable means to prevent such a use of the premises. Com. v. Bay, 115 Mass. 146 (1874).

DAMAGES—INTERRUPTION OF BUSINESS—PROFITS.—In Di Palma v. Weinman, 121 Pac. Rep. 38 (N. M. 1911), the plaintiff's business was interrupted by an agency for which the defendant was liable, and he was forced to move into another building to continue his retail drug business. The questions raised were the right to recover future profits; and what evidence was necessary to prove the damages sustained. The court held that it was immaterial whether the business was, on the whole, profitable or unprofitable, since the plaintiff lost an opportunity to sell goods: his loss was the net profits he would have made on such sales; and to prove this loss it was not necessary to introduce evidence as to, (*a*) the amount of the stock he carried, or (*b*) the amount of capitol invested, or (*c*) to produce books from which a bookkeeper could ascertain the percentage of profits realized from the business.

In Brigham v. Carlisle, 78 Ala. 243 (1884), the court said: "Profits are not excluded from recovery because they are profits; but, when excluded, it is on the ground that there are no *criteria* by which to estimate the amount" with sufficient certainty. And in the leading case on the recovery of profits, Griffin v. Colver, 16 N. Y. 489 (1858), the broad general rule is laid down that their recovery is subject to but two conditions: (1) the damages must be such as may fairly be supposed to have entered into the contemplation of the parties; and (2) they must be certain, both in their nature and the cause from which they proceed. In Allison v. Chandler, 11 Mich. 542 (1863), where the plaintiff was ousted from his store in the middle of his term, the court did not adopt the certain measure of damage,—the difference in rents for the old and new stores respectively,—but allowed recovery for the plaintiff's loss of business by the change. When it clearly appears that an established business has been interrupted, from which the owner expected to realize profits, he should recover compensation for whatever profits he makes it reasonably certain he would have realized. Chapman v. Kirby, 49 Ill. 211 (1868); 1 Sedg. on Dam., Sec. 182, and cases cited. Pennsylvania has refused to follow these authorities, McNeil Co. v. Steel Co., 207 Pa. 493 (1904), holding that unless the injury was wantonly inflicted the loss of profits may not be recovered. Erie City Iron Works v. Barber, 102 Pa. 156 (1883). But where the action is for the wrongful dissolution of a partnership the Pennsylvania rule reaches practically the same result as in the other states: instead of instructing the jury to consider future profits in estimating the damages, in Pennsylvania the court instructs them to find the value of the business as a going concern as the measure of damages. Reiter v. Morton, 96 Pa. 229 (1880).

The principal case is in line with the great weight of authority on the right to recover profits; and in view of the testimony there introduced the production of books, etc., was properly held unnecessary. Marquart v. La Forge, 5 Duer, 559 (N. Y. 1856).

DECEIT—INTENT TO CAUSE INJURY.—A wholesale dealer sold certain "temperance brew" beer to a retailer, fraudulently representing it to be non-intoxicant. As a matter of fact, it was alcoholic; and as a result the retailer was sent to jail and fined for selling it without a license. He sued his vendor in deceit to recover damages for the false representation. One of the defenses was, that the subsequent sale by the retailer introduced an intervening agent and broke the causal connection. The court held that there is sufficient ground for recovery if it be shown that, but for the fraud, no injury would have occurred. The re-sale must have been anticipated by the original seller. Anderson v. Evansville Brewing Ass'n, 97 N. E. 445 (Ind. 1912).

The general rule of damages, in cases of fraud or deceit, is that the defendant is responsible for those results which must be presumed to have been within his contemplation at the time the fraud was committed. Langridge v. Levy, 2 M. & W. 519 (Eng. 1837); Smith v. Duffy, 57 N. J. L. 679 (1895). But whether special damages can be presumed to have been within the contemplation of the parties depends upon how much of the real situation of the parties was disclosed at the time of the fraudulent transaction, and whether this class of damages was intended to be recovered, if suffered. Webster v. Woolford, 81 Md. 329 (1895). Damages may be recovered for any injury which is the direct and natural consequence of the plaintiff's acting upon the defendant's representations. Carvill v. Jacks, 43 Ark. 439. (1884); Oakes v. Miller, 11 Colo. App. 374 (1898).

But the fraud must have been the proximate cause of the damage. Byard v. Holmes, 34 N. J. L. 296 (1870); Dawe v. Morris, 149 Mass. 188 (1889). Those results are to be considered proximate which the wrong-doer, from his position, must have contemplated as the probable consequence of his fraud. Smith v. Bolles, 132 U. S. 125 (1889).

In a case somewhat similar to the principal case the vendee of a hotel, believing the fraudulent representations of the vendor that the hotel had a license, sold liquors. As part of his damage, he alleged imprisonment and fine. The court held that a plaintiff cannot recover damages where he must found his claim on his own violation of a criminal statute. Martachowski v. Orawitz, 14 Pa. Sup. 175 (1900).

EVIDENCE—ARE COMMUNICATIONS BETWEEN A DENTIST AND HIS PATIENT PRIVILEGED?—A dentist does not practice surgery or medicine, and is not included by a statute prohibiting practitioners in such professions from testifying concerning information acquired in attending a patient. Howe v. Regensburg *et al.*, 132 N. Y. Supp. 837 (1911).

At common law communications between physicians and surgeons and their patients were not privileged, but in practically every state this defect has been remedied by statute, Wig. Ev., Section 2380. The question as to whether or not dentists are included by such statutes apparently has been directly raised only once before. This was in the case of People v. DeFrance, 104 Mich. 563 (1895), when the conclusion reached was similar to that in the principal case. As is, however, indicated by the New York court, the opposite view is adopted in the conclusion reached in Matter of Hunter, 60 N. C. 372 (1866) and in State v. Beck, 21 R. I. 288 (1898).

The New York court, under previous constructions of the statute in that jurisdiction upon collateral points, could not logically have reached a different conclusion, but it is submitted that the decision is erroneous in principle. It is true that a dentist is not a practitioner of surgery or medicine in the strict sense of these terms, but nevertheless the reasons for holding communications privileged between members of such professions and their patients are equally applicable today to dentists. Members of the latter profession practice the art of healing disease to the same degree in their line as physicians and surgeons do in theirs. See 4 Cent. Dict., *Dentists*. Since it is the present-day custom of licensed practitioners of medicine to devote themselves to specializing in some branch of their profession such

as opthalmology, or to limit their activities to one branch of surgery such as abdominal operations, it is difficult to see why a distinction should be made between those who practice in only one branch of the medical profession and those who have always studied and practiced one side only of the same general art of healing. Then, too, the influence of pain at a dentist may provoke disclosures which would not occur as a result of the average doctor's examination, while the explanations of the patient relative to the condition of his teeth may necessarily disclose a general physical condition requiring a reticence similar to that required of an ordinary physician. Finally, the communications made to a physician or surgeon while the patient is under the influence of delirium or an anæsthetic cannot be of a more personal and private nature than information imparted to a dentist by a patient who has taken gas preparatory to having a tooth extracted. It is accordingly submitted that, today, the practice of dentistry should be legally recognized as a branch of the medical profession, and the reasons for holding privileged communications made to doctors and surgeons should be applied to statements made by the clients of dentists to those whose professional services they employ.

EVIDENCE—JUDICIAL NOTICE OF THE NATURE OF BEER.—In Moreno v. State, 143 S. W. Rep. (Texas) 156 (1911), it was held that, where, in a prosecution for the sale of intoxicating liquor in local option territory there has been no issue raised as to whether the beer sold was intoxicating, it is not error if the court assumes in its charge that beer is an intoxicating liquor.

A Texas statute reads: "The term intoxicating liquors used in this act shall be construed to mean fermented, vinous or spirituous liquors." In answer to the question presented whether judicial notice could be taken of the fact that beer is an intoxicant, the court said: "Everyone knows that beer is a fermented liquor," hence it is an intoxicant. But in a decision before the statute the same court refused to take judicial notice that beer is an intoxicant. Harris v. State, 86 S. W. (Tex.) 763 (1905). It is to be noted, however, that in the principal case the court needed only to take notice that beer is a fermented liquor and by virtue of the statute it would necessarily follow that it is an intoxicant. Whether the court would have decided in the same way, if it were not for the statute, is doubtful. "We will frankly say that, although the decisions of this court on that question did not appeal to our judgment, we might have followed them had not the legislature provided the [foregoing act]."

The prevailing doctrine is that judicial notice will be taken that beer is a fermented or malt liquor and an intoxicant. State v. Briffitt, 58 Wis. 39 (1883); U. S. Ducournau, 54 Fed. 138 (1891); State v. Jenkins, 32 Kan. 477 (1884); State v. Carmody, 50 Ore. 1 (1907); Myers v. State, 93 Ind. 251 (1883); Williams v. State, 72 Ark. 19 (1903). *Contra:* Hansburg v. People, 120 Ill. 21 (1887); Du Vall v. Augusta, 115 Ga. 813 (1902). But where the term beer is used with a qualification it is a question of fact for the jury to determine whether the article sold is intoxicating. State v. McCafferty, 63 Me. 223 (1874) (hop beer); Bell v. State, 91 Ga. 227 (1892) (rice beer).

GARNISHMENT—FOREIGN JUDGMENT.—A man recovered judgment against a railroad company in Missouri. One of his creditors brought suit against him in Iowa and proceeded to garnishee this Missouri judgment. It was held that since the Iowa court, in which the garnishment suit was brought, had no jurisdiction to protect the railroad company in Missouri on the judgment, the garnishment must fall. Elson v. Chicago, etc., Ry. B., 134 N. W. 547 (Iowa, 1912).

This case is in accord with the almost universal doctrine that garnishment proceedings against a judgment must be brought in the jurisdiction

in which the judgment sought to be reached was rendered. Shinn v. Zimmerman, 23 N. J. L. 150 (1851); Revier v. Hurlbut, 81 Wis. 24 (1891); Hamill v. Peck, 11 Colo. App. 1 (1898). It is even held in a great many jurisdictions that the garnishment proceedings must be brought in the same court that rendered the judgment. Rosenstein v. Tarr, 51 Fed. 368 (1892); Hamill v. Peck, 11 Colo. App. 1 (1898); Perkins v. Guy, 2 Mont. 15 (1873).

A very few jurisdictions, including Pennsylvania, allow the garnishment of a judgment obtained in a foreign state. Fithian v. R. R., 31 Pa. 114 (1857); Knebelkamp v. Fogg, 55 Ill. App. 563 (1894).

GUARANTY—NOTICE OF ACCEPTANCE.—In Hartley Silk Mfg. Co. v. Berg, 48 Pa. Sup. 419 (1911), the defendant promised in a letter to guarantee the payment of a bill of another up to a certain amount. The letter was mailed in Philadelphia to the plaintiff in New York, and the goods were shipped from New York. The defendant received no notice of acceptance. *Held:* The contract was a New York contract, governed by New York law, where no notice of acceptance is required.

In New York, as in most states, a guaranty of this nature is absolute, the liability of the promisor being fixed by the mere default of the principal. It does not depend upon any other event than the non-performance, and no notice of acceptance is necessary. Davis v. Wells Fargo Co., 104 U. S. 159 (1881); Smith v. Dunn, 6 Hill 543 (1844); Scribner v. Schenkal, 128 Cal. 250 (1900); Bright v. McKnight, 1 Sneed (Tenn.), 158 (1853).

In Pennsylvania notice of acceptance is necessary even when the guaranty is at the request of the guarantor. Evans v. McCormick, 167 Pa. 247 (1895); Kay v. Allen, 9 Pa. St. 320 (1848). These cases are not overruled, but their effect is practically nullified by the tendency of the Pennsylvania courts to hold such guaranties contracts of suretyship, when notice becomes unnecessary. Radiator Co. v. Hoffman, 26 Pa. Sup. 177 (1904); Iron City Nat'l Bank v. Rafferty, 207 Pa. 238 (1903).

MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF COUNSEL.—The defendant in a suit for malicious prosecution set up that it had been advised by counsel that a prosecution of the plaintiff for perjury was warranted. The defendant had not told counsel that the plaintiff was insane when the false oath was made. It further developed that the advice had not been asked until after the prosecution for perjury had been started. It was held that the advice of an attorney, given on an incomplete statement of facts, did not amount to probable cause and, in any event, would have to be sought before starting the prosecution, to be available as a defense. Indianapolis Traction Company v. Henby, 97 N. E. Rep. 313 (Ind. 1912).

Where the prosecutor, before the commencement of the action, secures the advice of reputable counsel, that the prosecution is warranted, there is probable cause, though the advice is erroneous. Scotten v. Longfellow, 40 Ind. 24 (1872); Shea v. Colquet Co., 92 Minn. 348 (1904); Walter v. Sample, 25 Pa. 275 (1855). But the advice must not be sought merely as a shelter from a possible action for malicious prosecution. McCarty v. Kitchen, 59 Ind. 500 (1877); McLeod v. McLeod, 73 Ala. 42 (1882). And it must have been acted on in good faith. Smith v. Walter, 125 Pa. 453 (1889).

A full and fair statement of all the facts within the knowledge of the prosecutor is indispensable. Bell v. Atlantic City Co., 58 N. J. L. 227 (1895); Black v. Buckingham, 174 Mass. 102 (1899); Marx v. Mann, 1 Pa. Co. Ct. 262 (1885). And it must include all material facts which, with common prudence, he should know. Stevens v. Fassett, 27 Me. 266 (1847). *Contra:* Holliday v. Holliday, 53 Pac. 42 (Cal. 1898); King v. Apple River Company, 131 Wis. 575 (1907). An omission of a material fact, thinking it immaterial, will not bar the defense. Young v. Jackson, 29 S. W. Rep. 1111 (Tex. 1895); Harris v. Woodford, 98 Mich. 147 (1893); Baldwin v. Weed,

17 Wend. (N. Y.) 224 (1837). *Contra:* Dunlap v. New Zealand Ins. Co., 109 Cal. 365 (1895); Hill v. Palm, 38 Mo. 13 (1866).

Counsel must be such that the defendant has no reason to suppose him interested or biased. White v. Carr, 71 Me. 555 (1880); Shea v. Colquet Co., *supra.* Accordingly, an attorney may not find protection by advising himself. Rwy. Co. v. Mason, 148 Ind. 578 (1897).

Advice given by a magistrate or other unprofessional person cannot afford protection. Potter v. Casterline, 41 N. J. L. 22 (1879). *Contra:* as to magistrates: Maudlin v. Ball, 104 Tenn. 597 (1900).

NEGLIGENCE—PROOF OF ASSUMPTION OF RISK.—The deceased, who had worked with the defendant company for six years, was killed by an explosion of dust in the defendant's grain elevator. In an action to recover damages for his death the non-assumption of this risk of employment can be satisfactorily shown by purely negative evidence proving that no warnings in regard to this danger had been given and that the deceased had never mentioned to his family or friends that he was aware of the peculiar risk arising from the explosive character of the dust. Barney v. Quaker Oats Co., 82 At. Rep. 113 (Vt. 1912).

The burden of proving non-assumption of risk is, as a rule, upon the plaintiff. Louisville, W. A. & C. Ry. Co. v. Quinn, 14 Ind. App. 544 (1896); Musich v. Packing Co., 58 Mo. App. 322 (1894). But where the plaintiff is free from contributory negligence it has been held that the burden is on the defendant to show that the defect causing the injury was so apparent as to bring the result within the hazards assumed by the servant in his service. Appel v. Buffalo, N. Y. & P. R. R., 2 N. Y. St. Rep. 257 (1886). In the principal case, the Vermont rule that the burden of proving non-assumption of risk is always on the plaintiff is, under the circumstances of the case, contrary to the better opinion on the subject. It was shown that the defendant company could have removed the explosive dust by installing appliances made and generally used for that particular purpose. It is accordingly submitted that the rule in Nadau v. White River Lumber Co., 76 Wis. 120 (1890), is the true one under the facts; namely, that where the evidence shows that the danger was one which ought not to have attended the plaintiff's employment, the burden of proving that the plaintiff did assume this risk is on the defendant.

In regard to the competency of the testimony to negative the assumption of risk, it is settled that negative evidence may, in reality, be of an affirmative character, as showing that something did not, in fact, exist. Chicago Cons. Trac. Co. v. Gewens, 113 Ill. App. 275 (1904). So, also, positive evidence has not, necessarily, a greater weight than negative testimony. C., C., C. & St. L. Ry. Co. v. Richerson, 19 Ohio Cir. Ct. R. 385 (1899). It is undoubtedly true that the negative fact that one does not tell something is not necessarily evidence that he does not know it; but, as was said by Lord Cairns in the Stanton Peerage Case, 1 App. Cas. 278 (1875): "In dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together." Therefore, since in the principal case the cumulative force of the circumstantial negative testimony was very great, the court would appear to have been correct in sustaining the conclusion that, under the circumstances, the fact that the deceased had never spoken about the risk from the dust was sufficient evidence to lead a jury to infer that he did not know of its dangerous characteristics.

PROPERTY—RIGHT OF THE STATE TO FORBID RIPARIAN OWNERS TO DIVERT WATER.—The right of a riparian owner to use the water of a navigable stream to create power, returning the water to the stream, is a private right appurtenant to the riparian land; but such right must be exercised in subordination to the public rights of navigation; and, where it interferes with

those rights, it may be forbidden by the legislature. State v. Bancroft, 134 N. W. Rep. 330 (Wis. 1912).

Riparian owners may alter the channel of the river by constructing dams and flumes and diverting the water for manufacturing purposes, so far as such changes are possible without the infringement of the public right to a way as free and convenient as would be afforded by the river in its natural condition. Conn. R. Lumber Co. v. Alcott Falls Co., 65 N. H. 290 (1889). One who erects a dam across a public stream is not liable to a riparian owner further up the stream for damage to his land, if the injury was due to an extraordinary flood held back by the dam, though he is, if it was due to a flood, ordinary for the season. Bell v. McClintock, 9 Watts, 199 (1839).

On the other hand, the diversion of the waters of a navigable stream by a wingdam may be both a public and a private nuisance. Yolo Co. v. City of Sacramento, 36 Cal. 193 (1868). Riparian owners along a navigable stream are not entitled to damages for any diversion or use of the waters by the state, according to Crill v. City of Rome, 47 How. Prac. (N. Y.) 398 (1873); but in Green Bay and Miss. Canal Co. v. Kaukauna Water Power Co., 90 Wis. 370 (1895), it was said that such is not true where the diversion is for other purposes than those of improving navigation; and, furthermore, the waters, when returned, must flow past the land of the lower riparian owner in the same channel as they did originally. Where the stream is diverted from its natural channel by a riparian owner, over or in front of the land of a lower proprietor, that is of itself an injury, because it is an interference with a proprietary right, and equity will give relief, though the plaintiff could neither show actual damage, nor in what particular way such damage would be likely to arise, according to a dictum in Saunders v. William Richards Co., Ltd., 2 N. Brunsw. Eq. 303 (1901).

RELEASE—EFFECT OF RELEASE OF ONE JOINT TORT FEASOR ON THE LIABILITY OF THE OTHERS.—In Walsh v. R. R. Co., 97 N. E. Rep. 408 (N. Y. 1912), the New York Court of Appeals held that proof that the plaintiff "settled" in writing a claim against one company for personal injuries did not discharge the defendant company from joint liability.

It is the generally accepted doctrine that a release under seal given to one joint tort-feasor operates to discharge the others. Ellis v. Esson, 50 Wis. 138 (1880); Rogers v. Cox, 66 N. J. L. 432 (1901); Chamberlain v. Murphy, 41 Vt. 110 (1868). And this is true even though the release contains a provision reserving the right to proceed against a co-tort-feasor. Guenther v. Lee, 45 Mo. 60 (1876); O'Shea v. R. R. Co., 105 Fed. (C. C.) 563 (Ill. 1901).

In most jurisdictions a release not under seal given to one joint tort feasor is a bar to recovery against the others; and especially is this true if consideration can be shown and the damages suffered are a mere matter of opinion. Long v. Long, 57 Ia. 497 (1881); Donaldson v. Carmichael, 102 Ga. 40 (1897); Goss v. Ellison, 136 Mass. 503 (1884). Where, however, such a release contains a provision reserving the right to proceed against others jointly liable the courts are divided as to its force. In the following decisions such a provision was held void: Abb. v. R. R. Co., 58 L. R. A. 293 (Wash. 1902); Williams v. Le Bar, 141 Pa. 149 (1897). On the other hand, in many jurisdictions there is a decided tendency towards allowing the intentions of the parties to regulate the effect of the release. In such jurisdictions the instrument is construed to be a covenant not to sue and not a technical release. Gilbert v. Finch, 173 N. Y. 455 (1903); Pogel v. Meille, 60 Wis. 248 (1884); Chicago v. Babcock, 143 Ill. 358 (1892). The court in Walsh v. R. R., *supra*, following this doctrine, interpreted the word "settled" as indicating a compromise rather than a satisfaction or a release. It is, however, rather difficult to reconcile the decision with the recent New York case of Dahlstrom v. Gemunder, 198 N. Y. 449 (1910).

TORTS—AN INFANT'S CONTRIBUTORY NEGLIGENCE IN BEING INTOXICATED.—Where an infant of fifteen years is injured owing to intoxication from liquor furnished him by the defendant, whether or not he was guilty of contributory negligence in drinking the liquor, is a question for the jury. Cole v. Searfoss, 97 N. W. Rep. 345 (Ind. 1911).

Where an adult's injury is due solely to his voluntary intoxication he can, of course, never recover from the person who sold or gave him the liquor. The conclusion that he contributed to his own intoxication is irresistible; and for injuries resulting only from intoxication, such as a fall, his claim is barred by his conduct. In regard to infants, however, it seems reasonable, in most cases, to leave to the jury the question of whether or not the plaintiff deliberately became intoxicated. This is because the degree of care required of an infant, *sui juris*, is ordinarily one for the jury. C., C., C. & St. L. R. Co. v. Scott, 111 Ill. App. 234 (1903); Monessey v. Smith, 73 N. Y. S. 673 (1901). Consequently the inference of negligence cannot be conclusively drawn by the court; and where there is any reasonable doubt upon a question of negligence it must be left to the jury. 1 Beven, Negligence, 131, and cases cited.

Cases of this nature must, of necessity, depend entirely upon their exact facts; and it is submitted that if the infant plaintiff had been twenty years of age and somewhat accustomed to intoxicants, the court would have been justified in entering a non-suit. In the principal case there was a dissenting opinion, but the law as laid down in the decision itself is undoubtedly the better view.

WILLS—AS OF WHAT TIME MUST A SPECIFIC LEGACY BE CONSTRUED.—A testator by will bequeathed "twenty-three of the shares belonging to me in the London Company." Subsequent to the execution of the will, but prior to the death of the testator, the capital of the company was subdivided, each original share being changed into four new shares having one-fourth of their original par value. *Held:* That the bequest passed ninety-two of the new shares, the equivalent of twenty-three of the old. *In re* Clifford, L. R. (1912) 1 Chan. 29.

Before the passage of the Wills Act of 1837, the courts had determined in many instances that the use of the word "my" in connection with a bequest of personalty passed only that which was owned at the time of the execution of the will. Cochran v. Cochran, 14 Sim, 248 (1834); Patterson v. Patterson, 1 My. & K. 12 (1832). These decisions were a limitation of the early rule that a bequest of personalty spoke from the death of the testator. Goodlad v. Burnett, 1 K. & J. 341 (1855), settled the rule that the contrary intention provided for in the statute could not be established by the mere use of the word "my." In deciding the case the court announced the principle that if the bequest were specific and definite, and incapable of increase or decrease during the lifetime of the testator, then the contrary intention would be apparent and the will would speak from the date of its execution. This test had been applied in the earlier case of Oakes v. Oakes, 9 Hare, 666 (1852), where under a state of facts similar to those existing in *In re* Clifford, *supra*, a like conclusion was reached.

Those American jurisdictions in which a statute similar to the English Statute is in force have followed very closely the English decisions. Fidelity Co.'s Appeal, 108 Pa. 492 (1885), contains a review of the law and a summary of the decisions.

For a complete discussion, see Jarman on Wills, 12th Edit., page 396.